

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK ROBERT QUIROZ,

Plaintiff,

v.

MATTHEW CATE, et al.,

Defendants.

) No. C 11-0016 LHK (PR)

) ORDER GRANTING PLAINTIFF'S  
) MOTION TO AMEND COMPLAINT;  
) DENYING DEFENDANTS'  
) MOTIONS TO DISMISS WITHOUT  
) PREJUDICE; DIRECTING  
) DEFENDANTS TO RESPOND

) (Docket Nos. 105, 119, 123, 125, 128,  
) 129)  
)

Plaintiff, a state prisoner proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Upon initial screening, the Court partially dismissed Plaintiff's complaint, and ordered it served upon named Defendants. Defendants have filed a motion to dismiss for failure to state a claim, and a request for qualified immunity. (Docket No. 105.) Defendant Cate has also filed a separate motion to dismiss for failure to state a claim. (Docket No. 123.) On March 8, 2012, Plaintiff filed a motion to amend his complaint, along with a proposed amended complaint.

A plaintiff may amend the complaint "once as a matter of course within [] 21 days after serving it." Fed. R. Civ. P. 15(a)(1)(A). But, if the complaint requires a responsive pleading, a plaintiff may amend the complaint "21 days after service of a responsive pleading, or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1)(B). In all other cases, a plaintiff must obtain the defendant's consent or leave of Court

1 to amend a complaint. Fed. R. Civ. P. 15(a)(2). Here, there is no indication that Plaintiff has  
2 obtained Defendants' consent. However, it does not appear that Defendants would be prejudiced  
3 by allowing Plaintiff to amend his complaint. Thus, the Court GRANTS Plaintiff leave to amend  
4 his complaint. *See id.* ("The court should freely give leave [to amend] when justice so  
5 requires."). The Clerk shall file Plaintiff's amended complaint. So filed, the amended complaint  
6 (docket no. 126) is the operative complaint.

7 As such, the Court DENIES Defendants' pending motions to dismiss without prejudice.  
8 (Docket Nos. 105, 123.) Plaintiff's ex parte request to file an opposition to Defendants' motion  
9 is DENIED as moot. Defendants' motion for an extension of time to file a reply to Plaintiff's  
10 opposition is DENIED as moot. Plaintiff's opposition, filed March 23, 2012, is hereby stricken.  
11 Defendants may file a new motion to dismiss that encompasses the cognizable claims and  
12 supporting facts in Plaintiff's amended complaint.

13 Liberally construed, Plaintiff's asserts that: (1) Defendants retaliated against him for  
14 filing grievances, filing a previous lawsuit, and submitting a declaration in support of another  
15 inmate's civil complaint; (2) Defendant Countess and John Doe # 4 violated his rights to  
16 association and marry and/or maintain familial relationships; (3) Defendants engaged in  
17 conspiracy; (4) supervisory Defendants failed to train and supervise their subordinates; and  
18 (5) Defendants violated state law. The Court finds that these claims are sufficient to state  
19 cognizable federal civil rights claims, and exercises its supplemental jurisdiction over the state  
20 law claim as well.

21 Plaintiff also alleges that Defendants violated the Equal Protection Clause. However, to  
22 state a claim for relief under the Equal Protection Clause, Plaintiff must allege that the defendant  
23 state actor acted at least in part because of Plaintiff's membership in a protected class. *Serrano*  
24 *v. Francis*, 345 F.3d 1071, 1081-82 (9th Cir. 2003). This, the Plaintiff has not done. Thus,  
25 Plaintiff's allegations regarding a violation of the Equal Protection Clause are DISMISSED with  
26 leave to amend. If Plaintiff believes he can amend this claim in good faith, he may move to  
27 amend the amended complaint within thirty days of the filing date of this order. Moreover,  
28 Defendants John Does 1-4 are DISMISSED without prejudice. Should Plaintiff discover the

1 identities of John Doe Defendants, he may move to include them at a later date.

2 Plaintiff has also filed a motion requesting that the Court take judicial notice that the  
3 Institutional Gang Investigations Unit and the Investigative Services Unit unlawfully confiscated  
4 and destroyed Plaintiff's documents, and denied Plaintiff access to the Court by deliberately  
5 interfering with Plaintiff's litigation. (Docket No. 119.) The Court can judicially notice facts  
6 that are not subject to reasonable dispute in that they are generally known within the territorial  
7 jurisdiction of the Court, or they are capable of ready determination by resort to sources whose  
8 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). The allegations contained in  
9 Plaintiff's motion are subject to reasonable dispute, and thus, they are not judicially noticeable.  
10 Accordingly, Plaintiff's motion for judicial notice is denied.

11 Plaintiff has also filed a motion for sanctions, or alternatively, a motion to stay (docket  
12 no. 120), as well as a motion to compel Defendant Short to produce discovery (docket no. 122).  
13 Defendants shall respond to Plaintiff's motions within thirty days of the filing date of this order.  
14 Plaintiff shall file any reply within fifteen days thereafter.

### 15 CONCLUSION

16 1. Plaintiff's motion for leave to amend his complaint is GRANTED. (Docket No.  
17 125.) The Clerk shall file Plaintiff's amended complaint, received on March 8, 2012.  
18 Defendants' motions to dismiss are DENIED without prejudice. (Docket Nos. 105, 123.)  
19 Plaintiff's ex parte request for leave to file excess pages is DENIED. (Docket No. 128.)  
20 Defendants' motion for an extension of time is DENIED. (Docket No. 129.) Plaintiff's motion  
21 for judicial notice is DENIED. (Docket No. 119.)

22 2. No later than **thirty (30) days** from the date of this order, Defendants shall file a  
23 response to Plaintiff's motion for sanctions and motion to compel. Plaintiff shall file his reply  
24 within **fifteen (15) days** thereafter.

25 3. No later than **ninety (90) days** from the date of this order, Defendants shall file a  
26 motion for summary judgment or other dispositive motion with respect to the cognizable claims  
27 in the amended complaint.

28 a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff

1 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
 2 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315  
 3 F.3d 1108, 1119-20 (9th Cir. 2003).

4 b. Any motion for summary judgment shall be supported by adequate factual  
 5 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil  
 6 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**  
 7 **qualified immunity found, if material facts are in dispute. If Defendants are of the opinion**  
 8 **that this case cannot be resolved by summary judgment, they shall so inform the Court**  
 9 **prior to the date the summary judgment motion is due.**

10 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
 11 served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

12 a. In the event Defendants file an unenumerated motion to dismiss under  
 13 Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

14 The defendants have made a motion to dismiss pursuant to Rule 12(b) of  
 15 the Federal Rules of Civil Procedure, on the ground you have not exhausted your  
 16 administrative remedies. The motion will, if granted, result in the dismissal of  
 17 your case. When a party you are suing makes a motion to dismiss for failure to  
 18 exhaust, and that motion is properly supported by declarations (or other sworn  
 19 testimony) and/or documents, you may not simply rely on what your complaint  
 20 says. Instead, you must set out specific facts in declarations, depositions, answers  
 21 to interrogatories, or documents, that contradict the facts shown in the defendant's  
 22 declarations and documents and show that you have in fact exhausted your  
 23 claims. If you do not submit your own evidence in opposition, the motion to  
 24 dismiss, if appropriate, may be granted and the case dismissed.

25 b. In the event Defendants file a motion for summary judgment, the  
 26 Ninth Circuit has held that the following notice should be given to plaintiffs:

27 The defendants have made a motion for summary judgment by which  
 28 they seek to have your case dismissed. A motion for summary judgment under  
 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for  
 summary judgment. Generally, summary judgment must be granted when there is  
 no genuine issue of material fact--that is, if there is no real dispute about any fact  
 that would affect the result of your case, the party who asked for summary  
 judgment is entitled to judgment as a matter of law, which will end your case.

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<sup>1</sup> The following notice is adapted from the summary judgment notice to be given to pro se  
 prisoners as set forth in *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See  
*Wyatt v. Terhune*, 315 F.3d at 1120 n.14.

When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

*See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim).

5. Defendants shall file a reply brief no later than **fifteen (15) days** after Plaintiff's opposition is filed.

6. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

7. All communications by the Plaintiff with the Court must be served on Defendants' counsel, by mailing a true copy of the document to Defendants' counsel.

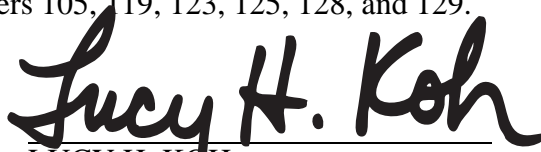
8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further Court order is required before the parties may conduct discovery.

9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court and all parties informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

This order terminates docket numbers 105, 119, 123, 125, 128, and 129.

IT IS SO ORDERED.

DATED: 4/9/12

  
LUCY H. KOH  
United States District Judge